



Federal Communications Commission
Washington D.C. 20554

April 9, 2002
DA 02-819

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Re: U.S. Telemetry Corporation's Request for Extension of Installment Payment Due Dates

Dear Messrs. Gavin and Besozzi:

This letter responds to your petition¹ filed on behalf of U.S. Telemetry Corporation ("U.S. Telemetry") requesting that the Federal Communications Commission ("Commission") grant a nine-month postponement of U.S. Telemetry's installment payment deadlines for 87 of its licenses in the 218-219 MHz Service.² For the reasons set forth below, we deny U.S. Telemetry's request.

1. Background

On September 10, 1999, the Commission issued the *218-219 MHz Order*, which modified the regulations governing the licensing of the 218-219 MHz Service.³ The *218-219 MHz Order*, among other

¹ Petition For Special Relief, dated January 15, 2002 ("Petition"); Supplement to Petition For Special Relief, dated January 30, 2002 ("Petition Supplement"); Letter to Peter A. Tenhula, Esq., Senior Legal Advisor, Office of Chairman Michael K. Powell, Federal Communications Commission, from Thomas L. Siebert, Chairman, U.S. Telemetry Corporation (February 8, 2002) ("Letter Supplement").

² In its Petition, U.S. Telemetry stated that it controlled 91 licenses for which installment payments were due on the last date of the second quarter grace period, January 31, 2001. Petition Supplement at 3; Letter Supplement. In fact, only 87 of the licenses that it held in the 218-219 MHz Service had payments due on January 31, 2002. The market numbers for the 87 licenses in the 218-219 MHz Service that are the subject of U.S. Telemetry's petition are: IVM014B, IVM016A, IVM025B, IVM030B, IVM032A, IVM034B, IVM042B, IVM053A, IVM064A, IVM065B, IVM078B, IVM080B, IVM081B, IVM084B, IVM092B, IVM100B, IVM101B, IVM106A, IVM106B, IVM108B, IVM112A, IVM113B, IVM115B, IVM119A, IVM122B, IVM128B, IVM131A, IVM133B, IVM134A, IVM136A, IVM139B, IVM144B, IVM145A, IVM149A, IVM152A, IVM156A, IVM158A, IVM158B, IVM162B, IVM165B, IVM166A, IVM171B, IVM174B, IVM178B, IVM180B, IVM182A, IVM182B, IVM185B, IVM187B, IVM192A, IVM197B, IVM199A, IVM199B, IVM206B, IVM212B, IVM215B, IVM216A, IVM216B, IVM218B, IVM226B, IVM231A, IVM233B, IVM234B, IVM237B, IVM239B, IVM240B, IVM250A, IVM254B, IVM258A, IVM260B, IVM264A, IVM265A, IVM266B, IVM267A, IVM271B, IVM281B, IVM284A, IVM294A, IVM297B, IVM298A, IVM300A, IVM302A, IVM302B, IVM305A, and IVM306A. For the four remaining licenses listed in U.S. Telemetry's filings, three of the licenses (market Nos. IVM029A, IVM184A, and IVM219A) are the subject of a pending application to assign the licenses to U.S. Telemetry. U.S. Telemetry also does not hold the fourth license (market No. IVM080A) and Commission's records do not contain an application to assign the license to U.S. Telemetry. See The Commission's Universal Licensing System database at <http://wireless.fcc.gov/uls/index.html>. Therefore, U.S. Telemetry is not the appropriate party to request a waiver of the installment payment obligations with respect to the four licenses. Even if U.S. Telemetry were the proper party to make such a request, it would be denied for the same reasons articulated in this order.

³ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (2000) ("*218-219 MHz Order*");

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measures, adopted a financial restructuring plan for “Eligible Licensees.”⁴ Eligible Licensees could choose between (i) reamortization of principal and interest installment payments over the remaining term of the license (“resumption option”); (ii) an amnesty option, in which Eligible Licensees could have all of the outstanding debt forgiven on any of the licenses that they chose to surrender to the Commission for reauction; or (iii) license prepayment, in which Eligible Licensees could retain or return as many licenses as they desired, as long as the licensees prepaid the outstanding principal owed for the retained licenses.⁵ Each Eligible Licensee was obligated to make its election by the Election Date. The Election Date would be established as the last business day of the first full month after the Commission released the *218-219 MHz Reconsideration Order*.⁶

From January 24, 2000 through April 12, 2000, applications were filed with the Commission to assign 45 of the 87 licenses at issue here to U.S. Telemetry.⁷ On April 20, 2000, while the applications were pending, the Commission reminded Eligible Licensees electing the resumption option that the first quarterly installment payment would be due at the end of the third month after the Election Date.⁸ From May 16, 2000 through September 8, 2000, additional applications were filed to assign the remaining 42 of the 87 licenses to U.S. Telemetry.⁹

On October 25, 2000, the Commission requested additional information from U.S. Telemetry regarding its eligibility to participate in the installment payment plan for 218-219 MHz service.¹⁰ Under the Commission’s rules, only entities that satisfy certain size standards are eligible to participate in the

Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, Order on Reconsideration, 14 FCC Rcd 21078 (1999) (“*218-219 MHz Recon Order*”).

⁴ *218-219 MHz Order* 15 FCC Rcd at 1499-1500, ¶ 4. Eligible Licensees are licensees that: (i) were current in installment payments as of March 16, 1998; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rule. *218-219 MHz Order*, 15 FCC Rcd at 1519-1529, ¶¶ 34-53.

⁵ *Id.*

⁶ Implementation Procedures for the Report and Order and Memorandum Opinion and Order Addressing the 218-219 MHz Services (Formerly Known as Interactive Video and Data Services (IVDS)) *Public Notice*, 15 FCC Rcd 7329, 7330-31 (2000) (WTB) (“*Implementation PN*”).

⁷ File Nos. 0000239919, 0000239928, 0000239936, 0000239944, 0000239958, 0000239971, 0000240023, 0000240038, 0000240069, 0000240075, 0000240080, 0000240086, 0000240100, 0000240557, 0000240568, 0000240596, 0000240609, 0000246155, 0000246160, 0000246169, 0000246200, 0000246806, 0000246822, 0000246853, 0000246868, 0000246874, 0000247064, 0000247074, 0000247251, 0000247263, 0000247272, 0000247294, 0000247310, 0000247316, 0000247708, 0000247711, 0000247718, 0000247745, 000024775, 0000247765, 0000247773, 0000247775, 0000247779, 0000247788, and 0000339433.

⁸ *Implementation PN*, 15 FCC Rcd at 7333.

⁹ File Nos. 0000233465, 0000245743, 0000245769, 0000245777, 0000245982, 0000245993, 0000246905, 0000246920, 0000246971, 0000247010, 0000247011, 0000247016, 0000247027, 0000247030, 0000247070, 0000247246, 0000247311, 0000333547, 0000333581, 0000333595, 0000333602, 0000334248, 0000334253, 0000334270, 0000334370, 0000334561, 0000334630, 0000334676, 000033487, and 0000334930.

¹⁰ Letter to Stephen Diaz Gavin, Esq., Counsel for U.S. Telemetry, from D’wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (November 14, 2000) (unpublished letter) (referencing request made by D’wana Terry in phone conversation with Stephen Diaz Gavin held on October 25, 2000) (“*Gavin Letter*”).

installment payment program.¹¹ On November 14, 2000, the Commission reiterated its request for this eligibility information.¹² U.S. Telemetry furnished the requisite information to establish eligibility to participate in the installment payment program on November 17, 2000.¹³ On January 3, 2001, the Commission released its *Revised Election Date PN*, in which the Commission announced that Eligible Licensees would be required to make an election on or before January 31, 2001.¹⁴ Accordingly, for those licensees electing the resumption option, the first quarterly installment payment would be due on April 30, 2001.¹⁵ Additional installment payments would be due every quarter for the remaining years of the 10 year term of the license.¹⁶ By January 24, 2001, U.S. Telemetry had received approval for the assignment of the 87 licenses conditioned upon payment in accordance with the Commission's rules.¹⁷ The assignors of these 87 licenses had timely selected the resumption option by the January 31, 2001 Election Date.¹⁸ From March 7, 2001 through March 30, 2001, U.S. Telemetry consummated the assignments.¹⁹

The Commission's installment payment rules allow licensees to use two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit an installment payment.²⁰ U.S. Telemetry made the April 30, 2001 quarterly installment payment on October 30, 2001, which was during the second quarterly grace period permitted under the Commission's rules.²¹ However, U.S. Telemetry failed to make the next quarterly installment payment, the July 31, 2001 installment payment, for 40 of the 87

¹¹ 47 C.F.R. § 95.816(c).

¹² *Gavin Letter*.

¹³ Letter to Ms. Magalie Roman Salas, Secretary, Federal Communications Commission, from Mr. Stephen Diaz Gavin, Esq., Counsel for U.S. Telemetry (November 17, 2000).

¹⁴ Federal Communications Commission Announces Change to The Election Date For 218-219 MHz Service, *Public Notice*, 16 FCC Rcd 4007 (2001); Wireless Telecommunications Bureau Announces Revised Election Date (January 31, 2001) and Amended Eligibility List For 218-219 MHz Service, *Public Notice*, DA 01-009 (rel. January 3, 2001) (WTB) (unpublished public notice) ("*Revised Election Date PN*").

¹⁵ *Implementation PN*, 15 FCC Rcd at 7333 (WTB gives notice that the first quarterly installment payment would be due at the end of the third month after the Election Date).

¹⁶ *218-219 MHz Order*, 15 FCC Rcd at 1523-24, ¶¶ 43-44.

¹⁷ Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 762 (January 24, 2001).

¹⁸ *Accepted Elections PN*, 16 FCC Rcd at 5902. Nineteen of these 87 licenses were obtained through the bankruptcy estate of Wincom Corporation, which had selected the resumption option. Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications – Action, *Public Notice*, Report No. 762, at 15-16, 41-42, 48-49 (rel. Jan. 24, 2001) ("*Assignment Authorization PN*"); see also *In re Winco Corp., D. Heusch Corp., Lincoln Distributing, Wincom Corp.* Consolidated Case Nos. 98-01647-R, 98-03493-R, 98-03494-R, and 98-02066-R, *Memorandum Opinion* at 4-5, 7 n.2 (Bankr. N.D. Okla. Jan. 10, 2000).

¹⁹ Information regarding the license assignment consummation dates for each license can be accessed from the Commission's Universal Licensing System database at <http://wireless.fcc.gov/uls/index.html>.

²⁰ 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

²¹ Petition at 2; 47 C.F.R. § 1.2110(g)(4)(ii).

licenses.²² In accordance with the Commission's rules, when U.S. Telemetry failed to make the July 31, 2001 quarterly installment payment with the associated late fees for 40 of the 87 licenses²³ within the two quarterly grace periods, *i.e.*, by January 31, 2002, U.S. Telemetry was in default, the 40 licenses automatically cancelled, and it became subject to debt collection procedures.²⁴

2. Discussion

In essence, U.S. Telemetry seeks a nine-month waiver of the installment payment rules with respect to installment payments due for all 87 licenses and a waiver of the automatic cancellation rule for the 40 licenses for which it failed to make an installment payment on January 31, 2002.²⁵ U.S. Telemetry argues that a "badly deteriorated" financial market has hampered its ability to raise sufficient funds to both continue technological development of its service and make installment payments.²⁶ U.S. Telemetry also alleges that due to the time required for the Commission to address issues raised in various petitions for reconsideration of the *218-219 MHz Order* and to process U.S. Telemetry's assignment applications the period for repaying its installment debt was "shortened effectively by 18 months."²⁷ U.S. Telemetry contends that this circumstance caused the amount of its installment payments to increase because the debt had to be paid over a shorter period of time.²⁸

To obtain a waiver of the Commission's installment payment rule, U.S. Telemetry must show that: (i) the underlying purpose of the rule would not be served or would be frustrated by application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of this particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that U.S. Telemetry has no reasonable alternative.²⁹ For the

²² Petition Supplement at 1-2, 4 (U.S. Telemetry decided to "withhold quarterly payment on 40 of the licenses" in order to "pursue its continued technology deployment and system rollout.").

²³ Petition Supplement at 4. On January 29, 2002, U.S. Telemetry remitted its installment payments together with its late payment fees for 47 of its 87 licenses. Petition Supplement at 3.

²⁴ 47 C.F.R. § 1.2110(g)(4)(iv); *see also* Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules, *Public Notice*, 13 FCC Rcd 18213, 18214 (1998) ("*WTB Guidance PN*") ("Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996."). The market numbers for the 40 licenses affected were: IVM032A, IVM034B, IVM042B, IVM053A, IVM064A, IVM078B, IVM092B, IVM106B, IVM108B, IVM115B, IVM122B, IVM131A, IVM133B, IVM139B, IVM144B, IVM149A, IVM150A, IVM152A, IVM156A, IVM158A, IVM165B, IVM166A, IVM182A, IVM182B, IVM185B, IVM187B, IVM192A, IVM199B, IVM212B, IVM216A, IVM218B, IVM226B, IVM234B, IVM250A, IVM258A, IVM264A, IVM265A, IVM266B, IVM284A, and IVM302B.

²⁵ Petition at 1; Petition Supplement at 1-2.

²⁶ Petition at 2-3, 9, 11; Petition Supplement at 2.

²⁷ Petition at 9-11; Petition Supplement at 2. The length of time from the Commission's release of the *218-219 MHz Order* to the Commission's consent to the assignment applications for the licenses at issue in U.S. Telemetry's Petition is approximately 15 months, not 18 months, as U.S. Telemetry asserts.

²⁸ Petition at 11.

²⁹ 47 C.F.R. § 1.925.

reasons discussed below, we find that U.S. Telemetry's waiver request fails to meet the Commission's standard for granting a waiver.

In adopting the restructuring plan in the 218-219 MHz Service, the Commission balanced the need to serve the public interest by affording relief to licensees with its duty to preserve the integrity of the auction process.³⁰ The Commission recognized that the options adopted might not suit every licensee's particular business plan.³¹ The Commission specifically found that the resumption option, coupled with the grace period rules, would provide specific relief for licensees that wished to retain their licenses but were experiencing financial hardship.³² Requiring that 218-219 MHz service licensees fulfill their payment obligations under the installment payment rules and thereby demonstrate their ability to pay as a condition to holding licenses ensures a fair and efficient licensing process.³³ It is also fair to participants in the original auction, to those who made elections based upon the restructuring options, and to licensees in other services that are also subject to the installment payment rules.³⁴

The Commission's late payment rules for installment payments provide licensees experiencing financial difficulties a substantial amount of time within which to pursue private market solutions to their financial difficulties.³⁵ The Commission adopted these provisions for "extraordinary circumstances – instances of financial distress – for which temporary relief is appropriate."³⁶ In light of the flexibility already present in the installment payment rules, to allow U.S. Telemetry additional time would only serve to

³⁰ 218-219 MHz Order, 15 FCC Rcd at 1499, ¶ 2 and 1520, ¶¶ 37-38; see Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 25020, 25027, ¶ 12 (2000) ("Second Order on Recon").

³¹ *Second Order on Recon*, 15 FCC Rcd at 25029, ¶ 19 (the Commission discussed the purpose and impact of the restructuring plan in rejecting a disaggregation option).

³² 218-219 MHz Order, 15 FCC Rcd at 1524, ¶ 44.

³³ See Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, Petition for Reconsideration, *Memorandum Opinion and Order*, FCC 00-434, 15 FCC Rcd 25113 (2000); Southern Communications Systems, Inc. Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103, 25106, ¶ 7 (2000) ("Southern Communications MO&O"); see also In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429-30, ¶¶ 95-96 (1998); Letter to E. Ashton Johnston, Esq., Counsel for Vista Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 12430 (2001) ("Vista"); Letter to J. Jeffrey Craven, Esq., Counsel for IVIDCO, L.L.C., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 7236 (2001) ("Ividco").

³⁴ See *Vista*, 16 FCC Rcd 12430; *Ividco*, 16 FCC Rcd 7236; *Southern Communication MO&O*, 15 FCC Rcd at 25106, ¶ 7.

³⁵ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 439-440, ¶ 110 (1997) ("Part 1 Third Report and Order"); see also *Southern MO&O*, 15 FCC Rcd at 25110, ¶ 15.

³⁶ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15304-05, ¶ 19 (2000) ("Part 1 Order on Recon of Third Report and Order"); *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110.

undermine the purpose behind enforcement of the Commission's payment deadlines, which the Commission decided is best served by strict enforcement after the expiration of the two quarterly grace periods.³⁷ Accordingly, we find that U.S. Telemetry has failed to demonstrate that the rule's purpose would not be served, or that it would be frustrated, by applying it to U.S. Telemetry, and that petitioner has failed to show that grant of the requested waiver would be in the public interest.

U.S. Telemetry's arguments concerning the facts and circumstances of its particular case do not change our analysis. U.S. Telemetry's contention that a decline in the financial markets decreased its ability to fund the operation and development of its system and to make installment payments³⁸ is not a unique fact or circumstance that meets the waiver standard.³⁹ U.S. Telemetry had full notice of both the specific terms of the 218-219 MHz Service financial restructuring and our general installment payment rules. In choosing to become a licensee, U.S. Telemetry accepted the risk that its assumptions regarding the availability of capital were incorrect.⁴⁰ Correspondingly, U.S. Telemetry is responsible for the consequences that flow from its business decisions to acquire the licenses at issue.⁴¹ In these circumstances, grant of a waiver request based upon U.S. Telemetry's speculation that market conditions will improve and that it will be attractive to potential investors is not an adequate basis for grant of a waiver. Finally, U.S. Telemetry's contention that the time required to process the assignment applications effectively shortened its repayment period by 18 months⁴² is also unpersuasive. The time required to process U.S. Telemetry's assignment applications did not change the payment obligations of Eligible Licensees electing the resumption option. The assignment applications were consummated before the due date for the resumption of installment payments.⁴³ Thus, U.S. Telemetry has the same payment schedule as any other 218-219 MHz licensees electing the resumption option. Further, grant of U.S. Telemetry's request would result in a payment schedule that was even shorter than the current schedule with correspondingly higher installment payments. Thus, U.S. Telemetry's financial difficulties do not constitute unique circumstances sufficient to justify waiver of installment payment rules.⁴⁴

Accordingly, IT IS ORDERED that, U.S. Telemetry's Petition for Special Relief, dated January 15, 2002, is DENIED.

³⁷ *Southern Communications MO&O*, 15 FCC Rcd at 25111, ¶ 15; Letter to Mr. Kurt Schueler, President, New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-2542 (rel. October 30, 2001) ("*New England Mobile*"); Letter to J. Curtis Henderson, Esq., Senior Vice President & General Counsel, Nucentrix Broadband Networks, Inc. and Peter D. Shields, Esq., Wiley, Rein & Fielding, from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 17 FCC Rcd 559 at 561 (2002).

³⁸ Petition at 2-3, 9; Petition Supplement at 2-3.

³⁹ *New England Mobile*, 16 FCC Rcd 19355 (2001) (holding that a 218-219 MHz licensee's inability to raise sufficient capital to build out and pay for licenses does not justify waiver of the payment rules particularly when the licensee assumed such risks in electing the resumption option); *see also Southern Communication MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).

⁴⁰ *New England Mobile*, 16 FCC Rcd at 19358.

⁴¹ This would hold true for any future acquisition of licenses in this or any other service.

⁴² Petition at 10-11; Petition Supplement at 2.

⁴³ Information regarding the license assignment consummation dates for each license can be accessed from the Commission's Universal Licensing System database at <http://wireless.fcc.gov/uls/index.html>.

⁴⁴ *See Southern MO&O*, 15 FCC Rcd at 25107, ¶ 10; *New England Mobile*, 16 FCC Rcd 19355.

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IT IS FURTHER ORDERED that this letter shall be sent to the U.S. Telemetry and its representatives by certified mail, return receipt requested.

This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.⁴⁵

Sincerely,

Margaret W. Wiener
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

⁴⁵ 47 C.F.R. § 0.331.